

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers and NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED	08-CA-167313, <i>et al.</i>
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**RESPONDENT BLUEFIELD HOSPITAL COMPANY, LLC
D/B/A BLUEFIELD REGIONAL MEDICAL CENTER’S
OPPOSITION TO GENERAL COUNSEL’S MOTION FOR
ADVERSE INFERENCE AND PRECLUSION**

As a Respondent in the above-captioned cases, Bluefield Hospital Company, LLC d/b/a Bluefield Regional Medical Center (hereafter, “Bluefield” or the “Hospital”) hereby opposes, by and through the Undersigned Counsel, the Motion for Adverse Inference and Preclusion

(hereafter, the “Motion”), which was filed by the General Counsel on May 10, 2018.

BACKGROUND

On February 22, 2017, Counsel for the General Counsel issued to the Hospital Subpoen *Duces Tecum* B-1-VI7KG9 (hereafter, the “Subpoena”). The Subpoena comprised fifty-nine (59) requests, with many requests including extensive subparts. On March 3, 2017, the Hospital filed a Petition to Revoke the Subpoena, arguing, in part, that the Subpoena was overly broad and subjected the Hospital to immense, undue burdens. Thereafter, on March 21, 2017, the Hospital submitted its Report on the Subpoena, which communicated, in compliance with the Administrative Law Judge’s March 7, 2017 Order, the Hospital’s positions with respect to the appropriateness of all requests contained in the Subpoena.

On March 23, 2017, the Administrative Law Judge issued his Order Granting in Part and Denying in Part the Hospital’s Petition to Revoke the Subpoena (hereafter, the “Order”). In his Order, the Administrative Law Judge required the Hospital to, where feasible, provide responses to the

Subpoena to the General Counsel by (or before) 10:00 am on March 27, 2017, the first date of the hearing.¹

On March 27, 2017, at approximately 10:00 am, the Hospital submitted its initial document production, which comprised both a hard copy and electronic production of hundreds, if not thousands, of responsive documents. See Ex. 1. During the first day of the hearing, and before reviewing any of the information produced by the Hospital earlier that morning, Counsel for the General Counsel sought for the Administrative Law Judge to impose Bannon Mills sanctions against the Hospital for its failure to satisfy its obligations under the Subpoena. (Tr. 60-61). The Administrative Law Judge declined Counsel for the General Counsel's request, describing the Hospital production of responsive information as a "rolling process." (Tr. 61).

Subsequently, from March 28, 2017, to April 7, 2017, the Hospital went on to submit a series of supplemental document productions that included hundreds of additional documents responsive to the Subpoena. See Exs. 1-6 & 9. On March 28, 2017, at approximately 8:00 am, the Hospital

¹ Contrary to the Motion, the Administrative Law Judge's March 23, 2017, Order did not require the Hospital to produce documents and electronically stored information (ESI) by April 7, 2017.

electronically submitted its **first** supplemental document production.²³ On March 29, 2017, at 1:20 am, the Hospital submitted its **second** supplemental document production.⁴ See Ex. 2. On March 29, 2017, at 8:57 am, the Hospital submitted its **third** supplemental document production.⁵ See Ex. 3. On March 30, 2017, at 8:09 am, the Hospital submitted its **fourth** supplemental document production.⁶ See Ex. 4. On March 30, 2017, at 12:21 pm, the Hospital submitted its **fifth** supplemental document production.⁷ See Ex. 5. On April 7, 2017, at 8:04 pm, the Hospital submitted its **sixth** supplemental document production.⁸ See Ex. 9.

On January 23, 2018, Counsel for the General Counsel communicated to the Hospital, for the first time, a document outlining “apparent

² The Hospital’s first supplement document production was not referenced by the Motion; therefore, it is attached to this document as “Exhibit A.”

³ The Hospital’s first supplemental document production consisted of, among other things, scheduling emails between the Hospital and the Union concerning collective bargaining.

⁴ The Hospital’s second supplement document production consisted of, among other things, thousands of employee time entries extracted from the Hospital’s timekeeping system.

⁵ The Hospital’s third supplement document production consisted of, among other things, the Hospital’s compliance policies and bargaining notes.

⁶ The Hospital’s fourth supplement document production consisted of, among other things, the Hospital’s staffing matrices and relevant requests for information.

⁷ The Hospital’s fifth supplement document production consisted of, among other things, documents related to Van Browning’s employment with the Hospital.

⁸ The Hospital’s sixth supplement document production consisted of, among other things, documents related to collective bargaining between the parties.

deficiencies” with the Hospital’s document production. See Ex. 16. From January 23, 2018 to February 4, 2018, the Hospital corresponded with the General Counsel, updating it with regard to the Hospital’s efforts in addressing and responding to the General Counsel’s “apparent deficiencies” document, and ultimately providing the General Counsel with the Hospital’s findings on February 4, 2018. See Exs. 16-22. On February 4, 2018, at 2:10 pm, the Hospital submitted its **seventh** supplemental document production, which consisted of electronically *archived* information from the Hospital’s former CEO, Bill Hawley and former CFO, Trigg James. See Ex. 21. The Hospital’s seventh document production consisted of internal email communications and other documentation related to the Hospital’s Anesthesia department. On February 5, 2018, at 10:13 am and 10:53 am respectively, the Hospital submitted its **eighth** and **ninth** supplemental document productions, completing its response to the General Counsel’s “apparent deficiencies” document. See Ex. 24 & 26. On that same day, and during the hearing, the Hospital produced a set of Don Carmody’s bargaining notes.

Throughout the months of February and March 2018, the Hospital and the General Counsel exchanged a series of emails communications in which the General Counsel not only inquired about certain details concerning the

Hospital's "self-conducted" and ESI document productions (See Ex. 27), but likewise cited, for the first time since the Hospital's initial document production, additional perceived inadequacies with the Hospital's document production, with the General Counsel: objecting to the Hospital's production in PDF format (See Ex. 33, 35, 38); demanding that the Hospital conduct additional searches of "all supervisors and managers" (Id.); and, requesting that the Hospital provide the General Counsel with a document retention policy (Id.). The Hospital provided prompt responses to the General Counsel's inquiries and demands, thoroughly explaining the Hospital's positions with respect to all issues raised by the General Counsel, and producing to the General Counsel the document retention policy as requested. See Ex. 34, 37 and 39.

ARGUMENT

Virtually upon the opening of the record before Your Honor on March 27, 2017, and before reviewing any of the information initially produced by the Hospital, the General Counsel evinced an intention to pursue sanctions under Bannon Mills, 146 NLRB 611 (1964). (Tr. 60-61). However, the Hospital is prepared to show that from the very beginning, it has undertaken good faith efforts to comply with the Subpoena, producing well more than one-thousand (1,000) documents in response to the Subpoena. Yet, the

remedies sought by the Motion could not be more extreme. Taken as a whole, the Motion inexplicably seeks Your Honor to compel the Hospital to comply with the Subpoena, prohibit the Hospital from presenting any evidence in connection with the allegations brought against it, and infer that the Hospital possesses documents that would, for all intents and purposes, prove that the Hospital violated the Act as alleged by the General Counsel.

As described above, the Motion is akin to a motion to dismiss, and as Your Honor is aware from previous experiences, such a remedy is unprecedented absent a showing of circumstances that the respondent's failure to comply tainted the entire proceeding. See Station Casinos, LLC, 358 NLRB 1556, 1571 (2012). Even so, despite the General Counsel's grand attempt to demonstrate otherwise, the Hospital's conduct and overall efforts in complying with the Subpoena are still a far cry from the emblematic circumstances under which the Board imposes limited sanctions on a responding party. See McAllister Towing & Transportation Co., 341 NLRB 394 (2004); Avondale Industries, 329 NLRB 1064 (1999); Wyandanch Day Care Center, Inc., 324 NLRB 480 (1997); Hedison Mfg. Co. 249 NLRB 791 (1980); Beta Steel Corp., 326 NLRB No. 126 (1998); Essex Valley Visiting Nurses Association, 352 NLRB 427 (2008).

The Subpoena, which seeks a massive production of documents, was served upon the Hospital less than a month prior to the opening of the hearing. On March 27, 2017, the date of the Hospital's initial document production, the Hospital produced a voluminous number of documents, with information produced in both hard copy and electronic formats. The Hospital's initial document production was so sizable that the General Counsel requested a recess in order to review the information produced. (Tr. 60-61). On March 27th, Your Honor observed that the Hospital's document production would be a "rolling process," and true to that observation, the Hospital offered a total of nine (9) formal supplemental document productions.

The documents produced generally covered a five-year period, and included a wide array of document types that required a review of approximately 100,000 documents. In the aggregate, voluminous amounts of information were produced, including but not limited to, organizational charts, dozens of Hospital policies, disciplinary action forms, personnel files, hundreds of relevant email communications, approximately five years-worth of daily department schedules, approximately five years-worth of payroll data, approximately 5 years-worth of employee timesheets, staffing matrices, requests for information, bargaining notes, and bargaining proposals. In fact,

the Hospital expanded its production to include archived data from former executives, CEO, David Henry and COO, Mike Makosky. The volume of records produced by the Hospital clearly met, if not, exceeded what could have been anticipated by the General Counsel in the first instance.

Any delays in the Hospital's document production did not arise from any willful or unequivocal refusal to produce documents, or an intent to disadvantage the General Counsel in the prosecution of its case. In fact, the Motion clearly illustrates that the Hospital demonstrated good faith efforts by working with the General Counsel throughout the entire process, including but not limited to, its commitment in promptly responding to and resolving the issues raised by the General Counsel's "apparent deficiencies" email drafted earlier this year. See Exs. 16 & 22-26. These good faith efforts, coupled with the lack of any cognizable prejudice suffered by the General Counsel, warrant Your Honor's denial of the Motion.

1.) The Hospital Searched the Records of a Reasonable Group of Supervisors and Agents

The General Counsel argues that the Hospital has refused to search the records of all custodians who are connected to the allegations set forth by the Complaint. See Motion, page 2. As part of the Order, Your Honor authorized the Hospital to conduct a search that focused on the files of supervisors and agents who have "some connection to one or more of the

allegations in the complaint.” See Order, page 4. The Hospital’s efforts to locate responsive documents was focused upon an appropriate, and extensive, group of supervisors and agents that included key members of the Hospital’s nursing and leadership team. These individuals were selected because, in one way or another, they were reasonably expected to possess information responsive to the Subpoena.

Nonetheless, the General Counsel continues to insist that the Hospital search the records of **all** the Hospital’s managers, supervisors and charge nurses without any regard for whether those individuals are connected, in any matter, to the allegations before Your Honor. See Motion, page 5. The General Counsel’s ongoing demand that Bluefield search the files of the entirety of the Hospital’s supervisory force is nothing more than a “fishing expedition” that boldly ignores not only the time-honored restrictions on the power of any federal agency, but Your Honor’s intentions when drafting the Order. See FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924) (“It is contrary to the first principles of justice to allow a search through all the respondent’s records, relevant or irrelevant, in the hope that something will turn up”).

In compliance with the Order, the Hospital duly disclosed to the General Counsel the identity of the supervisors and agents whose files were

searched for documentation responsive to the Subpoena. See Motion, Ex. 39, page 6. In response, the General Counsel informed the Hospital that, in order to comply with the Subpoena, the Hospital would need to search the files of “all supervisors and managers.” Id., page 5. At the same time, the General Counsel expressed a specific interest in a search of any files maintained by Bessie Brown, Lynn Puckett and Don Carmody. Id. Accordingly, in reply, the Hospital advised that a search had already been performed on the files maintained by Ms. Brown, *et al.*, and that no additional responsive documents were in their possession. Id., page 4.

In spite of the Hospital’s efforts to narrow the dispute, Counsel for General Counsel refused to take a single step back from their absolute position that the Hospital could only comply with the Subpoena by a search of the records maintained by each and every supervisor employed by the Hospital. See Motion, Ex. 39, page 4. The Hospital observed that the General Counsel’s view would require a search of records maintained by numerous supervisors who have no workplace relationship with represented employees, and most importantly, no connection to the allegations set forth by the Complaint. Id., page 3. And yet, the General Counsel refused to budge, and in support of their sweeping position, offered to the Hospital the example of a Charge Nurse who may have knowledge of nurses’ daily work

duties and / or their wage increase, which nearly proves the Hospital's point. Notably, the General Counsel did not explain how, for example, the Director of Environment Services, the Director of Materials Management, the Director of Food Services, and the list goes on, would have documents that could reasonably be expected to have any relationship with the allegations set forth by the Complaint. Given these circumstances, the Hospital satisfied its obligations under the Order when it chose a reasonable group of supervisors and agents.

2.) No Explanation for Why the Hospital Did Not Possess Records for Some Custodians

The General Counsel contends that Bluefield has not explained why no responsive documents were located for Bill Hawley and Trigg James, who were formerly, respectively employed as the Hospital's CEO and CFO. See Motion, page 3. As part of the ESI production, Bluefield informed the General Counsel that, although the Hospital requested that KPMG search the archived records of four former executives, namely, Mr. Hawley, Mr. James, David Henry and Michael Makosky, KPMG only located records for Mr. Henry and Mr. Makosky. See Motion, Ex. 18, page 3.

Thereafter, the General Counsel posed several questions related to the Hospital's search of ESI, but none of these questions related to the reasons why KPMG was unable to retrieve archived documents for Mr. Hawley and

Mr. James. Id., Ex. 27, page 1. The General Counsel did request production of Bluefield's policy on document retention, which the Hospital promptly turned over to the General Counsel. Id., Ex. 34, pages 1 – 2. The General Counsel acknowledged receipt of the policy on February 26, 2018 and never pursued any subsequent discussion with the Hospital as to why KPMG was unable to retrieve archived documents for Mr. Hawley and Mr. James. Instead, for the sake of preserving if not conjuring disputes, the General Counsel has seized upon the Motion as the opportunity to unveil the objection that the Hospital has not presented an explanation for the unavailability of Mr. Hawley and Mr. James' archived documentation.

The Hospital's January 26, 2018, explanation for why it was unable to produce information for Mr. Hawley and Mr. James remains accurate. To provide further explanation, once the Hospital provides KPMG with a list of custodians, KPMG conducts a search inside an ARS Portal (the "Active Directory"), which is comprised of four (4) electronic locations where archived emails may be found. Two of these four locations include Exchange email servers. Once a search for a custodian is conducted, if a custodian is found within the ARS system, the system will allow KPMG to extract the emails from any one of these four electronic locations. To the extent an individual is cannot be located in the ARS system, the only option

is to restore back up emails from the time custodians were using email, which is an extremely costly endeavor that is primarily used for disaster recovery situations, such as when the email server itself is destroyed. Even if the Hospital pursued this costly option, the likelihood of successfully restoring backup emails is questionable at best. In the case of Mr. James and Mr. Hawley, KPMG's search of the four electronic locations came up with zero results, thus preventing KPMG from locating emails for those two custodians.

3.) Self-Conducted Searches

Despite the General Counsel's attempts to illustrate to the contrary, the Hospital's efforts in satisfying its obligations under the Subpoena were diligent, expansive and comprehensive, requiring at least fifteen (15) of the Hospital's core management team to conduct sweeping searches for a wide-array of information that is maintained by various sources, including work computers, department files, internal storage rooms, external storage facilities, personnel files and HR data management software.

These "self-conducted" searches were based upon an abundant amount of personal guidance and assistance provided by the Hospital's legal counsel in the form of daily facility visits, group meetings, one-on-one discussions, conference calls and email correspondences. Specifically,

guidance was provided to all custodians on all issues surrounding their search and production, including a review and proper interpretation of the relevant subpoena requests, the types of documents that would be responsive to each subpoena request, the kinds of searches that were necessary in order to locate responsive documents, the appropriate body or population of documentation, the likely location of certain responsive information, and the timeframe applicable for each subpoena request based upon Your Honor's Order. To the extent a custodian was unable to locate responsive information during their initial search, further guidance was provided to the custodian in order to modify their overall search efforts to ensure a complete document production. Consequently, it was common for a custodian to conduct multiple searches in order to confirm that individual's final production population.

Despite its production of voluminous documents in response to the Subpoena at that point, the Hospital's diligent efforts did not conclude with its "self-conducted" searches, but was expanded to reach former supervisors' archived ESI data. The extensive undertaking necessary to retrieve this information from third-party vendor, KPMG, required the Hospital to incur enormous expenses not only in connection with KPMG's services, but also through increased attorneys' fees for the time spent reviewing approximately

19,500 documents, which were extracted by the service in response to comprehensive keyword searches. At the conclusion of its ESI production, the Hospital found that roughly 2% of the 19,500 archived documents were responsive to the Subpoena. In fact, many of the documents produced in response to the Hospital's ESI production were duplicative of information already produced and in possession of the General Counsel.

Nevertheless, in the General Counsel's view, the only approach by which Bluefield could comply with the Subpoena would be the (re)engagement of KPMG to review, by the use of an extremely expensive technology, the very same records that have already been searched by the relevant group of the Hospital's management. See Motion, page 6. The primary basis for the General Counsel's position is that the Hospital's Human Resources Director, Laura Martin, did not locate all of the e-mails that she exchanged with the Union in connection with the disciplinary action imposed upon Mike Adams. Essentially, therefore, based upon one manager who may have overlooked a few e-mail chains, which are minuscule when considered in the context of the Hospital's overall, enormous document production, the General Counsel urges Your Honor to compel the Hospital to pay out the immense sums of money that are necessary for KPMG's services.

Aside from the fact the General Counsel has not demonstrated the need for costly, outside review of the Hospital's files, the proceedings now before Your Honor show that these searches do not offer any level of superiority as compared to the searches carried out last year by the Hospital. Specifically, in the case of Mr. Henry and Mr. Makosky, only **2%** of these documents were responsive to the Subpoena, and the large majority had previously been produced by the Hospital on account of the search performed by the Hospital's current management team.

4.) Failure to Search All Sources of Responsive Documents

The General Counsel contends that the Hospital did not search all sources of responsive documents. See Motion, page 2 & 4. The solitary focus of the General Counsel's objection appears to be managers' "personal machines," and arises from the fact that, on one occasion, Ms. Martin created a responsive document on her home computer. Id., page 4. As explained to the General Counsel, Ms. Martin generated the note on her personal computer because her phone call with former CRNA, Marla Cline took place over the weekend when she was at home with her family.

As elsewhere, the General Counsel has taken what is plainly an out of the ordinary occurrence as a springboard to demand new, comprehensive searches performed on the entirety of the Hospital's supervisory force. The

Hospital's attorneys have represented to the General Counsel that, as part of the Hospital's supervision of the search for responsive documents, the Hospital's attorneys discussed with the relevant group of managers the likely sources of responsive documentation, and no manager advised of the fact they had used their personal computer (if any) to generate documents related to their work at the Hospital. The fact that Ms. Martin did not immediately recall the fact that, on one occasion approximately three and a half years ago, she prepared a one-page note of a phone call with a former employee, hardly provides any reasonable grounds to infer, as the General Counsel has done, there is some fundamental defect with the Hospital's document production.

Lastly, managers' personal computers appear to be outside the scope of the Subpoena, and rightly so. See Subpoena, "Definitions and Instructions," ¶ a & cc. Managers' personal computers are, after all, the personal property of the managers, and particularly given the facts here, the Hospital has no basis to demand that they waive their privacy rights simply in order to verify that their computers do not house responsive documentation.

5.) Failure to Provide All Required ESI

Historically, both in the case before Your Honor and the related litigation before Judge Laws, the Hospitals have generated PDFs of the documents responsive to the Subpoenas *Duces Tecum* served by the General Counsel. These productions were routinely accepted by the General Counsel without any objection. In fact, and ironically enough, the General Counsel would frequently object when a responsive document was not produced as a PDF.⁹ Today, evidently, the General Counsel has an entirely different view of things. Specifically, for every single document that has been produced as a PDF, and these documents number in the thousands, the General Counsel demands a wholesale reproduction of the documents in their “native” format (*e.g.*, Word) **and** the production of any and all so-called “metadata” associated with the document.¹⁰ For numerous reasons, Your Honor should reject the General Counsel’s demands, being as they are, patently unreasonable.

To begin with, the Hospitals’ routine production, and the General Counsel’s routine acceptance, of documents in a PDF format has become, in essence, the law of the case and should not be open to modifications based

⁹ As Your Honor may know already, among other benefits, a PDF enables the user to search through the document by the use of search terms.

¹⁰ As understood by the Hospital’s attorneys, “metadata” refers to electronic information related to the circumstances under which an electronic document is created, and as applicable, modified by a user. Thus, by way of example, metadata may show the date on which a document was created.

upon some belated and certainly questionable cry of deficiency by the General Counsel.¹¹ Moreover, the legal foundation for the General Counsel's demand, Sedona Principle 12, does not support the General Counsel's demand for the wholesale, indiscriminate production of metadata.

According to the General Counsel, the Principle states:

“Production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account *the need* to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search and display the information.”

See Motion, page 5 (emphasis added).

In the case here, the General Counsel has not come forward with the demonstration of any need for the metadata. Although the production that arose from the search of Mr. Henry's and Mr. Makosky's archived files included a document that showed the metadata for the production, the document was not offered into the record by the General Counsel nor was the document referenced by the General Counsel during the course of the hearings. Similarly, the Motion does not explain how the metadata has been, or would be, helpful to the preparation or presentation of the General Counsel's case, especially when considering that the evidence necessary to

¹¹ It is important to emphasize that despite the Hospital's daily PDF productions during the March 2017 phase of the hearings, the General Counsel accepted and did not object to this production format until February 2018.

prove its claims may be found on the face of the PDFs already produced by the Hospital.

As significantly, the General Counsel's formulation of Sedona Principle 12 overlooks key commentary, which provides as follows:

It was understood by the drafters . . . that the standard was ***not*** for the requesting party to have the same ability to 'access, search and display' the information in the ordinary course (which may have required a significant investment in time, money and proprietary resources), but the same ability to 'access, search and display' the information in the context of prosecuting and defending the claims and defenses at issue in the litigation . . . The touchstone remains that a requesting party is entitled to the production of ESI as it is ordinarily maintained or in a form that is reasonably usable for purposes of efficiently prosecuting or defending the claims and defenses involved in the matter."

See Comment 12.b.i (emphasis added).

The only prejudice the General Counsel has been able to conjure in connection with the Hospital's production is the notion that the metadata is necessary for the General Counsel to authenticate "certain documents" that were produced by the Hospital. See Motion, page 8. Certainly, the production of metadata for each and every document produced by the Hospital does not promote the type of "efficient" litigation envisioned by Sedona Principle 12. Between the creation of the agency in 1935 and the relatively recent advent of "e-discovery," the General Counsel's office has been to rely upon one methodology or another (*e.g.*, witness testimony or

stipulation) to authenticate incalculable masses of documentary evidence. Put simply, the General Counsel has failed to demonstrate to Your Honor any legitimate or demonstrable need for metadata as it relates to its preparation or prosecution of this matter, and has grossly overstated the need for documents to be authenticated by use of metadata, while at the same time, overlooked the time-honored methods by which documents have been authenticated during the course of the agency's history.

6.) Failure to Timely Provide Documents

Finally, the General Counsel contends, in part, that the Hospital's conduct, specifically, the Hospital's year-long, rolling document productions, and its delayed production of "recently located" documents in the possession of Don Carmody and Laura Martin, caused the General Counsel irreversible prejudice by, as far as one can tell, delaying its review of the information. The Board has held that sanctions may be imposed where the subpoenaed party willfully / maliciously delayed disclosing materials that were responsive, **and** the delay caused prejudice to the subpoenaing party's case. People's Transportation Service, 276 NLRB 169, 225 (1985). In People's Transportation Service, the Board endorsed using a multifactor analysis to evaluate whether sanctions are warranted to maintain the

integrity of the hearing process.¹² The Board also indicated that sanctions are not warranted if the disclosing party can provide a credible explanation for the late disclosure, even if the late disclosure caused prejudice to the subpoenaing party's case. Id. 229.

Regardless, a subpoenaed party's obligations do not end when it makes its initial productions, and it is well settled that a subpoenaed party must supplement or correct its productions in a timely manner if the party learns "that in some material respect to the disclosure or response is incomplete or incorrect" and the additional or corrective information has not been provided to the other parties. Station Casinos, LLC, 358 NLRB 1556, 1569 (2012), citing FRCP Rule 26(e)(1)(A). This Rule, therefore, "recognizes that parties (and their attorneys) may make mistakes and that previously overlooked (or new) information may come to light, but places the onus on the subpoenaed party or attorney to supplement the record and correct any mistakes or oversights when they occur." Id. at 1569.

¹² The Board agreed that the following factors should be considered: (1) the initial scope and specificity of the subpoena directions; (2) the volume of the records addressed, and those produced; (3) the nature of the call, or request for production, and the nature and type of prior responses; (4) other factors of record indicative of an opponent's actual intended compliance with subpoena direction [including] whether ... there has been voluntary prehearing and hearing response, or response to subsequent ruling on dispute thereon; (5) the status of the record showing on [a] claim made of prior conduct of a reasonable and diligent search; (6) the nature of the explanations offered for any late production; (7) the point in [the] hearing at which [the records were] produced; and (8) any other factors reasonably tending to establish there was good faith in adherence to [the Board's] subpoena process, [notwithstanding the] late production.

In the instant matter, the Hospital's document production consisted of a substantial, initial document production in response to complex and an overly exhaustive number of subpoena requests. The Hospital's initial production was the product of a weeks-long search that began once the Hospital was informed of the Subpoena's issuance. Moreover, the Hospital's good faith efforts in complying with the Subpoena did not conclude once it completed its initial production, continued throughout the March 2017 hearing with numerous supplemental productions, as was anticipated by the Subpoena's "Definitions and Instructions" and Your Honor during the start of the hearing. (Tr. 60-61).

In the aggregate, a wide array of information was provided, including but not limited to, organizational charts, dozens of Hospital policies, disciplinary action forms, personnel files, hundreds of relevant email communications, approximately five years-worth of daily department schedules, approximately five years-worth of payroll data, approximately 5 years-worth of employee timesheets, staffing matrices, requests for information, bargaining notes, and bargaining proposals. In fact, the Hospital expanded its production to include archived data from former executives, David Henry and Mike Makosky. The volume of records produced by the Hospital clearly met, if not, exceeded what could ever have been anticipated

by the General Counsel in the first instance. This was clearly the case based upon the General Counsel's abrupt request for a recess in order to review the Hospital's initial document production.

Nevertheless, despite its production of over one-thousand (1,000) documents in response to the Subpoena, while circumstances do show that the Hospital made very negligible omissions and mistakes that have been grossly embellished and amplified by the General Counsel, as soon as the Hospital realized that minor aspects of its production were incomplete, it promptly took corrective action by notifying the General Counsel and quickly producing the responsive documentation. Despite this, extant Board law does not support sanctions with such minor blemishes. Given these aforementioned circumstances, the General Counsel has failed to show that the Hospital willfully refused or otherwise acted in bad faith when it belatedly produced two documents that were innocently overlooked by Mr. Carmody and Ms. Martin. Both Mr. Carmody and Ms. Martin have provided Your Honor and the General Counsel with reasonable explanations as to why those documents were not previously produced.

In the case of Mr. Carmody, he simply recognized an oversight that was promptly corrected. As for Ms. Martin, her failure to produce work-related notes stored on her personal computer was likewise nothing more

than a simple mistake due to the fact that Ms. Cline unexpectedly called Ms. Martin during the weekend while Ms. Martin was at home with her family. Given the circumstances surrounding this uncustomary weekend phone call, which took place over three years ago, it was more than reasonable for Ms. Martin to have innocently omitted this document from production. In this regard, the Hospital has satisfied its obligation to supplement and correct its document productions.

Furthermore, the General Counsel has failed to show how the Hospital's belated productions have prejudiced the General Counsel's prosecution of the allegations set forth in the Complaint. For instance, with respect to the Hospital's belated production of Mr. Carmody's bargaining notes, the General Counsel's claim of prejudice is, at best, premature. Given the witnesses called thus far by the General Counsel in these proceedings, evidentiary rules would make it impossible for the General Counsel to utilize Mr. Carmody's bargaining notes as part of its case-in-chief. For instance, it would have been improper for either the General Counsel or the Hospital to utilize Mr. Carmody's bargaining notes prior to either party establishing, through Mr. Carmody's own testimony, the proper foundation for the document. Regardless, Mr. Carmody's bargaining notes would have

contained mostly duplicative information already recorded in other sets of bargaining notes produced by the Hospital and the Union.

Finally, the General Counsel has not been prejudiced by the Hospital's belated production of Ms. Martin's notes. To put it simply, assuming that Ms. Martin's notes accurately reflect the conversation had with Ms. Cline, Ms. Martin's notes are not substantially relevant to any allegation set forth in the Complaint as the focus of the conversation concerned Ms. Cline's medical condition and FMLA leave. Were this conversation of any consequence to Ms. Cline and the General Counsel's case, Ms. Cline would have recalled the conversation and brought it to the attention of the General Counsel in the first instance. Notwithstanding these arguments, to the extent Your Honor finds that the General Counsel has been prejudiced by the belated production of Ms. Martin's notes, the Hospital submits that any and all prejudice may be cured by providing the General Counsel an opportunity to question Ms. Martin about these notes at the resumption of the hearing on May 12, 2018.

CONCLUSION

For all the reasons set forth above, Bluefield respectfully requests that Your Honor deny the Motion.

Dated: Glastonbury, CT
May 30, 2018

Respectfully submitted,

/s/ _____

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NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER, COMMUNITY HEALTH SYSTEMS, INC., HOSPITAL OF BARSTOW, INC., d/b/a BARSTOW COMMUNITY HOSPITAL, WATSONVILLE HOSPITAL CORPORATION d/b/a WATSONVILLE COMMUNITY HOSPITAL and / or COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION, LLC, a single employer and / or joint employers and QUORUM HEALTH CORPORATION and QHCCS, LLC, successor employers and NATIONAL NURSES ORGANIZING COMMITTEE (NNOC), CALIFORNIA NURSES ASSOCIATION / NATIONAL NURSES ORGANIZING COMMITTEE (CNA/NNOC) and CALIFORNIA NURSES ASSOCIATION (CNA), NATIONAL NURSES UNITED	08-CA-167313, <i>et al.</i>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------

CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly
admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. §
1746, that, on May 30, 2018, the document above was served upon the
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Dated: Glastonbury, CT
May 30, 2018

Respectfully submitted,

/s/ _____

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EXHIBIT A

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